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NO. 466

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

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WEST TEXAS UTILITIES COMPANY, INC., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD, ET. AL., RESPONDENTS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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## BRIEF IN OPPOSITION FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, INTERVENOR

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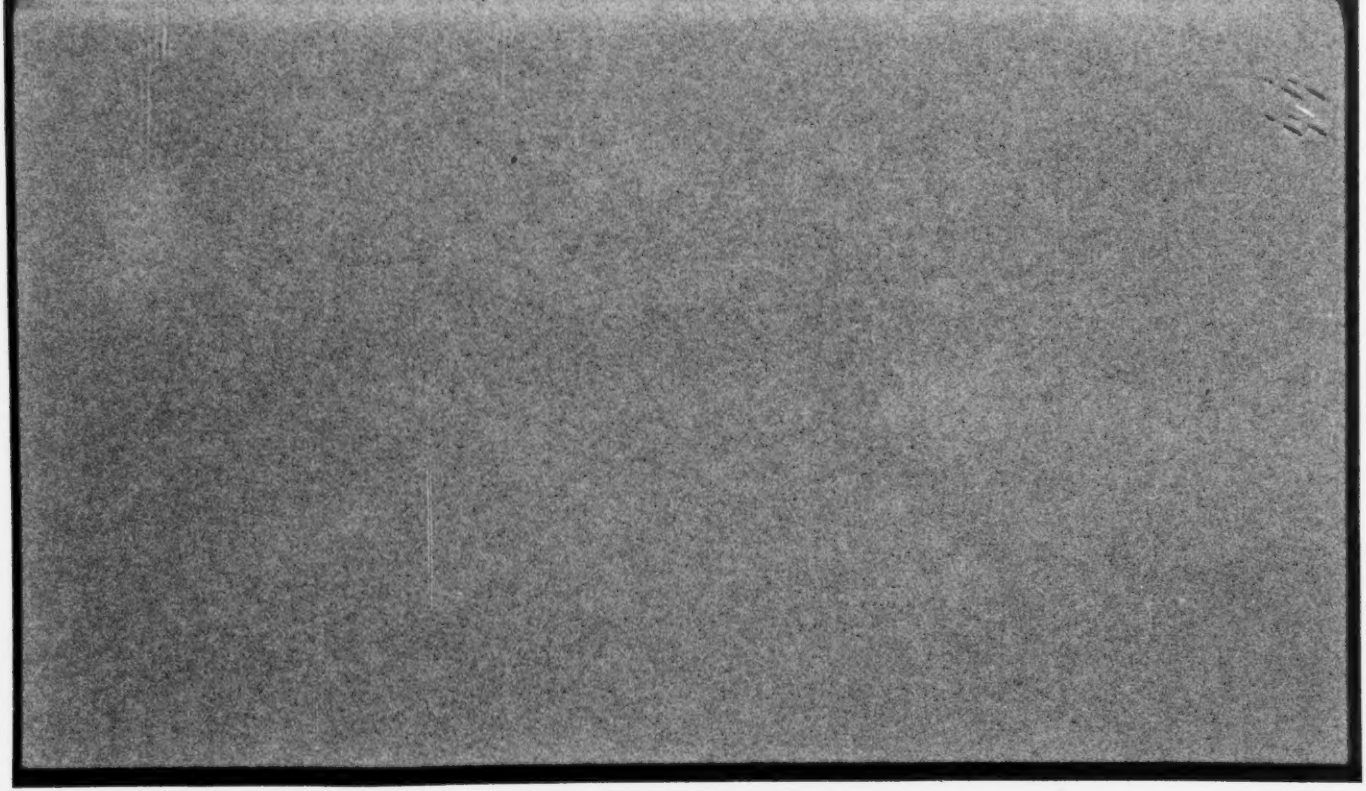

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The International Brotherhood of Electrical Workers (Local Unions Nos. 898, 920 and 1044), A. F. of L., the charging party in this case (hereinafter referred to as the IBEW), was granted leave to intervene in the court below by formal order of the United States Court of Appeals for the District of Columbia Circuit. Pursuant to such permission a brief was filed and oral argument presented.

It may be stated parenthetically that the IBEW was the first International Union affiliated with the American Federation of Labor to sign the non-communist affidavits at a time when there was considerable con-

troversy among the affiliates of the Federation as to whether the labor movement should refuse to sign the affidavits and abstain from utilization of the procedures of the National Labor Relations Board (Joint Appendix 125; See Proceedings of the American Federation of Labor Convention, October, 1947).

This brief in opposition to the grant of the petition for a writ of certiorari sought by the West Texas Utilities Company is limited to the issues arising out of the non-communist affidavit provisions of the Labor-Management Relations Act of 1947. It is respectfully submitted that these issues are the only matters presented by petitioner which raise a question under Rule 38 (5).

Intervenor believes that the principles relied upon by the Court of Appeals for the District of Columbia Circuit are correct and that the principles relied upon by the Courts of Appeals for the Fourth and Fifth Circuits are not in accordance with law. Argument is not presented in this brief in support of this view since the issue on the petition is to be determined under Rule 38(5) rather than on the merits.

Intervenor's opposition is based primarily on the point that although the decision of the Court of Appeals for the District of Columbia Circuit (*West Texas Utilities Company, Inc.*, v. *National Labor Relations Board*, 184 F, (2d) 233) conflicts with the decisions of the Courts of Appeals for the Fourth and Fifth Circuits (*National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 184 F. (2d) 98 and *National Labor Relations Board* v. *Postex Cotton Mills*, 181 F. (2d)

919) in the principles utilized by the respective courts, there is, however, an independent ground of decision in the instant case as to which there is no conflict.

In the *West Texas Utilities* case, *supra*, the officers of the American Federation of Labor filed all the documents prescribed by Sec. 9(f)(g) and (h) of the Act on November 7, 1947, seven months prior to the date of the issuance of the complaint (June 24, 1948) and a few days prior to the filing of the charge (November 12, 1947). In the *Highland Park* and *Postex* cases, *supra*, the officers of the Congress of Industrial Organizations, the parent federation in these latter cases, had not filed the prescribed documents before the complaints issued.

The court below ruled that Sec. 9(h) of the Act provides that if an unfair labor practice is committed by an employer, such as the refusal to bargain in this case, the union may not seek Board aid to compel him to cease and desist "unless there is on file with the Board their affidavits executed *contemporaneously or within the preceding twelve month period* (29 USCA, Sec. 159(h))" by the officers covered. The Court established as an independent ground of decision the clear and unambiguous language of the statute which permits the union to utilize the facilities of the Board if it files the affidavits *contemporaneously* with the institution of the proceeding (Pet. br. 40-41). Here, compliance was effected, even under the rule in *Highland Park*, seven months prior to the issuance of the complaint.

The decision in the instant case can thus stand even

if this Court were to affirm the ruling of the Court of Appeals for the Fourth Circuit. Accordingly, it is respectfully submitted that the petition for a writ of certiorari in the instant case should be denied unless a case is made out for the exercise of the discretionary authority of this Court on grounds other than a direct conflict in the decisions of the respective Courts of Appeals.

It is our contention that petitioner's brief does not make out such a case under the considerations outlined in Rule 38(5).

Petitioner's contentions that the court below should not have considered the issue of the proper time for filing the prescribed documents because it was raised for the first time by the intervenor in the court below and because the fact of compliance by the American Federation of Labor on November 7, 1947, was not established in the record of the proceeding before the trial examiner, are procedural, and do not raise questions of general importance or substance. Indeed, even if the issue on this petition for a writ of certiorari is whether the court below erred in these respects, we believe that the action of the court below in ruling on this point was entirely proper.

Both the trial examiner and the Board ruled there had been a refusal to bargain. On the basis of the prior ruling of the Board in *Northern Virginia Broadcasters* and *IBEW Local 1215*, 75 NLRB 11, there was, therefore, no need or occasion for the intervenor to raise this point until the case had reached the Court. The intervenor then raised the question on the basis of

the ordinary rule in appellate proceedings that respondent has the right to urge any argument in support of the ruling in his favor, including contentions not passed on by the deciding body below (see *Langnes* v. *Green*, 282 U. S. 531). The fact of compliance by the American Federation of Labor was called to the attention of the court below in an appendix to the brief of the intervenor which is also set forth as an appendix to this brief (Appendix A). This is a matter of official record which this Court may notice. It has also been called to the attention of this Court in the petition for a writ of certiorari filed by the Solicitor General on behalf of the National Labor Relations Board in *National Labor Relations Board* v. *Highland Park Manufacturing Co.* (Petition in Docket No. 425, October Term, 1950, at p. 7 fn. 4).

Petitioner also argues that the ruling of the court below holding that affidavits can be filed contemporaneously with the institution of unfair labor practice proceedings before the National Labor Relations Board would serve to destroy the effectiveness of the non-communist affidavit provisions of the Act. The Act has been in effect for more than three and a half years. Nevertheless, petitioner does not cite a single actual case of the situation it contemplates, i.e., where a communist dominated union seeks bargaining rights, is refused such rights by the employer because of non-compliance by the union and thereafter the union changes its elected officers and files an unfair labor practice proceeding before the Board. The concern voiced by peti-

tioner is anticipatory rather than factual. This Court has granted petitions for the writ where actual difficulties have developed on a broad scale in the administration of a statute which can be resolved by its decision. Here it is asked to grant the petition on a showing of anticipated difficulty.

We contend, moreover, that petitioner's illustration is not a sound basis for inferring that the congressional intent will be defeated by the procedural rule established by the court below. The central point of the method chosen by Congress to rid the unions of communism was the establishment of an incentive for union members to replace communist officers through limitation of National Labor Relations Board processes to unions headed by officers who have complied with the non-communist affidavit provisions of the Act. If the actual occurrence of an employer unfair labor practice is irremediable by a substitution of legitimate officers for communist officers, under the procedural rule proposed by petitioner, the practical incentive for union members to make the change is less than the incentive provided by the general lesson of limitation of Board processes in cases of future employer unfair labor practices which may or may not occur.

It is respectfully submitted that petitioner's reasoning is actually based on the assumption that the replacement of officers in the illustration would not accomplish a bona fide change in the character of the union. This assumption is *contra*, however, to the fundamental basis of the method chosen by Congress.

There is another point which we believe should be called to the attention of this Court even though it is not discussed in petitioner's brief. There is a considerable degree of difference among the members of the National Labor Relations Board on the question of when the prescribed documents must be filed and some variation in their rulings on the point, *Andrews*, *supra*, and *New Jersey Carpet Mills, Inc.*, 92 NLRB No. 22, 27 LRRM 1114 (December, 1950).

We contend that this condition existing within the National Labor Relations Board does not raise the issue to such a level of importance as would serve to save the petition for a writ of certiorari from being denied.

Even if there were a direct conflict between the decision of the Court of Appeals for the District of Columbia Circuit and the decisions of the National Labor Relations Board, the case would not merit the granting of the writ of certiorari. It is obvious that the National Labor Relations Board, although an important administrative agency of the Executive Department, does not have the status of a court of appeals so as to bring this matter within the rule that conflicts between decisions of the United States Circuit Courts of Appeals are appropriate subjects for review by this Court. Nor is this a case where the decision of the court below is in conflict with a well established construction given a statute by administrative agents charged with its enforcement (cf. *Patterson* v. *Lamb*, 329 U. S. 539). The decision of the Board in the *Andrews* case, 87 NLRB No. 62, was rendered on December 6, 1949, by a divided

Board of three to two. No reference will be found in the majority decision of the Board in *Andrews* to that part of the language of the statute which the court below deemed to be so clear and unambiguous that it required the interpretation, as a matter of law, that the affidavits may be filed contemporaneously with the issuance of the complaint. There are three different positions stated by members of the Board in its decision in *New Jersey Carpet Mills, Inc., supra.* No effort was made by the dissenting members in this case to analyze the statutory language relied upon by the court below.

Furthermore, insofar as the importance of the issue is concerned, it should be noted that the National Labor Relations Board has stated in its petition for a writ of certiorari in the *Highland Park* case that in the fourteen cases now pending before the courts of appeals on the non-communist affidavit question, "The Board's complaint issued at a time when the parent federation of which the charging union was an affiliate, had not complied with the filing requirements in Sec. 9 (f) (g) and (h)." (Petition in Docket No. 425, October Term, 1950, p. 8.) There are apparently twenty other cases which have been referred to the General Counsel of the Board with instructions to seek enforcement and these are described as "similar" to the cases now pending in the courts of appeals. Therefore, it appears, on the basis of the information available to the intervenor through the representations made to this Court by the Board, that the independent ground of decision relied upon in his brief in opposition is not involved in any

of the cases which are now pending in the courts of appeals and is probably not involved in any of the cases in which orders have been entered by the Board but have not yet reached the courts.

The fact is, moreover, that the *Andrews* decision was reversed by the Board on the basis of the decision of the court below in *West Texas Utilities Company* and only one member of the board has expressed the view that the proper rule on the question of the time when compliance must be effected will vary, depending upon whether the employer advises the union at the time he refuses to bargain that his reason for such refusal is its non-compliance with the filing requirements of the Act. This view, which was not required by the facts presented in the *New Jersey Carpet Mills* case (27 LRRM 1119 fn. 20) is referred to as a "hypothetical situation" by the two other members of the majority (27 LRRM 1119) and as an "immaterial" consideration by the two dissenting members. In any event, the expression of this view by a Board member does not establish a direct conflict between the decision of the Board in *New Jersey Carpet Mills, supra*, and the decision of the Court of Appeals for the District of Columbia in *West Texas Utilities Co., supra*. Even if the Board were to be treated as having the status of a Court of Appeals for this purpose, the petition for a writ of certiorari should be denied if it is based on an alleged conflict of the principles utilized by the court below and the Board in reaching their respective decisions in *West Texas Utilities Co., supra*, and in *New Jersey Carpet Mills, supra*,

which are not in conflict. It is an *a fortiori* proposition that the petition for a writ of certiorari should be denied if the consideration of the case by this Court would serve only to resolve the conflict of principles utilized by the members of the Board in arriving at their conclusions on the matter of law which has been decided in explicit terms by the court below.

In addition to the above considerations, we believe we should bring to the attention of the Court certain factual distinctions in the three cases which have been ruled on by the United States Circuit Courts of Appeals, on the major issue of whether the officers of a parent federation are required to file non-communist affidavits in order to establish the eligibility of otherwise complying internationals and local unions who are affiliated with such federation.

The Courts of Appeals for the Fourth and Fifth Circuits had before them the constitution of the Congress of Industrial Organizations when they decided the status of that federation (Pet. br. 47-48). The Court of Appeals for the District of Columbia Circuit had the constitution of the American Federation of Labor before it when it ruled on the point (Pet. br. 36 fn. 15). These constitutions differ.

Furthermore, in the *Postex* case, *supra*, the Court noted that a stipulation had been made at the hearing that the CIO is a "labor organization" (Pet. br. 45) and serious weight was given by the Court to this stipulation in its decision that the statutory requirements had not been met (Pet. br. 50). The Court of Appeals

for the Fourth Circuit assumed that the question presented by the *Highland Park* case was identical with that before the Court of Appeals for the Fifth Circuit although no reference is made in the opinion of the Court of Appeals for the Fourth Circuit as to whether any such stipulation was entered into (Pet. br. 23). In the instant case there was no stipulation as to the status of the American Federation of Labor and the Court determined that the activities of the American Federation of Labor did not fall within the statutory definition of the key term "labor organization" (Pet. br. 36-37).

The intervenor also wishes to point out that since it is in the position of a respondent it believes that it may, under the rule of *Langnes* v. *Green*, *supra*, advance argument in support of the judgment below even though the contention was not passed upon by the court below. It is respectfully submitted that the employer has no litigable interest in the question of whether a union is eligible for service by the National Labor Relations Board. *Perkins* v. *Lukens Steel Company*, 310 U. S. 113; and see *Stark* v. *Wickard*, 321 U. S. 288. The Congress intended that the filing requirements of the Act would establish a protection of the public safeguarded by the executive action of the Board and by criminal proceedings applicable to the makers of false affidavits. The statutory language employed by the Congress does not admit of the view that the Congress intended the issue of compliance to be available for litigation by the employer in an unfair labor practice proceeding.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

LOUIS SHERMAN,
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January, 1951.

**APPENDIX A**

NATIONAL LABOR RELATIONS BOARD
Washington 25, D. C.
May 1, 1950

Mr. George Meany, Secretary-Treasurer,
American Federation of Labor,
901 Massachusetts Avenue,
Washington 1, D. C.

DEAR MR. MEANY:

This is to advise that the records in this office indicate the American Federation of Labor gained initial compliance with the filing requirements of Section 9(f) (g) and (h) of the Labor Management Relations Act, 1947, on November 7, 1947. You are further advised the National Labor Relations Board was not issuing letters of compliance at that time.

Very truly yours,

/s/ CLAUDE B. CALKIN,
*Affidavit Compliance Officer.*